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IN THE COURT OF APPEALS OF INDIANA

DONALD JESS SMITH, JR.,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 09A02-0712-CR-01145
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE CASS SUPERIOR COURT
The Honorable Richard Maughmer, Judge
Cause No. 09D02-0501-FA-0002

June 26, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

After a bench trial, Donald Jess Smith, Jr., was convicted of five counts of Class A felony child molesting and sentenced to consecutive thirty-year terms, resulting in an aggregate sentence of 150 years. He appeals his sentence, contending that the trial court erred in failing to recognize his complete lack of criminal history as a mitigating factor and in recognizing as an aggravating factor that he held a position of trust with the victim. He also argues that his sentence is inappropriate. We conclude that the trial court abused its discretion in failing to recognize Smith's lack of criminal history as a mitigating circumstance, and we conclude that his 150-year sentence is inappropriate. We revise Smith's sentence to sixty years.

Facts and Procedural History

A.R. met Smith when she was approximately eight years old. Tr. Vol. 26 p. 9.[1] At that time, A.R.'s mother was in a romantic relationship with Smith's brother, and Smith spent a lot of time with A.R.'s family, including moving into their home for a while. *Id.* at 9, 11. After Smith later moved out of A.R.'s home, he babysat A.R. and her siblings regularly on weekends. *Id.* at 12.

On one occasion when A.R. was eleven or twelve years old, A.R. and her siblings were with Smith in his apartment. At that time, A.R.'s family lived on High Street in Logansport, Indiana. The siblings were sleeping, and A.R. was lying on the floor watching a movie. *Id*. at 13-14. Smith moved next to A.R., pulled down her pants,

[1] Smith has submitted a twenty-seven-volume transcript on appeal, each paginated separately. Generally, transcripts should be prepared with consecutive page numbers from beginning to end, no matter how many volumes the entire transcript requires. Ind. Appellate Rule 28(A)(2). To avoid confusion, we have included the applicable volume number for direct citations to the transcript.

spread her legs, and performed oral sex upon her. *Id.* at 14. The same thing occurred twice more during the time frame that A.R. lived with her family on High Street: while A.R. watched a movie in his apartment, Smith removed her pants and performed oral sex upon her. *Id.* at 17-18.

When A.R. was twelve or thirteen years old, she moved with her family to her grandmother's house on Perrysburg Road in Logansport. *Id.* at 21. The family hung blankets from the ceiling of the basement, and each child thereby received his or her own "bedroom." *Id.* One evening, Smith came over to the house while A.R.'s mother was at work and her grandmother was in bed. *Id.* at 22. While A.R. was watching a movie in her bedroom, Smith talked to her for a while and then took off her shorts and performed oral sex upon her. *Id.* at 23-24. A couple of months later, Smith took A.R. and her siblings to a park. *Id.* at 25. He returned with them to the Perrysburg Road house, where the siblings fell asleep in their bedrooms, and Smith accompanied A.R. to the basement. *Id.* As on previous occasions, Smith removed A.R.'s pants and performed oral sex upon her. *Id.* All of the acts described occurred between 1997 and 2000.

A.R. did not disclose what had happened to her until 2005, when confronted with questions from her mother and Smith's brother. *Id.* at 27. After A.R. informed police of her allegations, Smith went to the Logansport Police Department and confessed to performing oral sex upon A.R. on multiple occasions. State's Ex. 2. Thereafter, the State charged Smith with five counts of child molesting as a Class A felony.[2] After a bench trial, Smith was convicted as charged. A sentencing hearing was held, and the trial court

[2] Ind. Code § 35-42-4-3(a)(1).

sentenced him to thirty years on each count, to be served consecutively for an aggregate sentence of 150 years. Appellant's App. p. 12. Smith now appeals his sentence.

Discussion and Decision

Smith argues that the trial court abused its discretion in two ways: (1) by failing to recognize his complete lack of criminal history as a mitigating factor and (2) by recognizing in aggravation that he had a position of trust with the victim. He also argues that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

I. Abuse of Discretion

Fashioning a defendant's sentence is within the trial court's discretion, and we will reverse only upon a showing of an abuse of that discretion. *Bacher v. State*, 722 N.E.2d 799, 804 (Ind. 2000). It is within the trial court's discretion to enhance a presumptive sentence or to impose consecutive sentences for multiple offenses. *McCarthy v. State*, 749 N.E.2d 528, 539 (Ind. 2001). Before a trial court may impose enhanced or consecutive sentences, it must: "(1) identify the significant aggravating factors and mitigating factors; (2) relate the specific facts and reasons that the court found . . . those aggravators and mitigators; and (3) demonstrate that the court has balanced the aggravators with the mitigators." *Veal v. State*, 784 N.E.2d 490, 494 (Ind. 2003).

In this case, the trial court sentenced Smith to consecutive presumptive[3] terms of thirty years for each of the five counts of Class A felony child molesting. Ind. Code § 35-50-2-4 (Supp. 1996). In support of the imposition of consecutive sentences, the trial

[3] Smith was sentenced under the pre-2005 version of Indiana's sentencing statute. Although he was sentenced in December 2007, his crimes occurred between 1997 and 2000, which is before the amendments to our sentencing statutes. Therefore, our former presumptive sentencing scheme applies. *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007) (noting that the sentencing statute in effect at the time a crime is committed governs the sentence for that crime).

court relied upon two aggravating circumstances: Smith's position of trust with the victim and the repetitiveness of his offenses against the victim. Appellant's App. p. 20-21. The trial court found no mitigating circumstances. *Id.* at 20. Smith contends that the trial court improperly declined to find his lack of criminal history to be a mitigating circumstance and that the trial court improperly recognized as an aggravating circumstance that he held a position of trust with the victim.

A. Lack of Criminal History

The trial court observed that Smith had no prior criminal history but did not recognize this as a mitigating circumstance. A trial court must consider all mitigating circumstances put forward by the defendant, but it is within the trial court's sound discretion whether to recognize a particular mitigating circumstance. *Bacher*, 722 N.E.2d at 804. Nonetheless, our Supreme Court has recognized that a defendant's lack of criminal history is, as a general matter, a substantial mitigating circumstance. *Loveless v. State*, 642 N.E.2d 974, 976 (Ind. 1994) ("A lack of criminal history is generally recognized as a substantial mitigating factor."). Further, we have explained that the longer a defendant has lived without engaging in criminal activity, the more significant a lack of criminal history will often be when fashioning the defendant's sentence. *Rutherford v. State*, 866 N.E.2d 867, 874 (Ind. Ct. App. 2007); *Cloum v. State*, 779 N.E.2d 84, 91 (Ind. Ct. App. 2002).

Here, the record reflects that Smith had absolutely no criminal history prior to or separate from the offenses leading to his convictions. His Presentence Investigation

Report[4] reveals no juvenile or adult convictions or arrests, and during Smith's sentencing hearing the trial court recognized that he lacked a criminal history. Appellant's App. p. 20. However, the trial court did not find this fact to be a mitigating circumstance: "I find that you have no criminal history not to be an aggravating or mitigating factor. I[] mean, I'm considering but I'm not finding it either way. I mean, I'm expecting people in our society not to have any criminal history." *Id.* Because the law in this state is clear that a lack of criminal history is generally a substantial mitigating circumstance and Smith was denied mitigation not because of a consideration peculiar to him or his crimes but rather because of the trial court's apparent disagreement with this premise, we conclude that the trial court abused its discretion in failing to recognize Smith's complete lack of a prior criminal history as a mitigating circumstance.

B. Position of Trust

The trial court found that Smith held a position of trust with his victim and that this was an aggravating circumstance supporting the imposition of consecutive sentences. Holding a position of trust with one's victim is a valid aggravating circumstance that may be considered by the sentencing court. *Bacher*, 722 N.E.2d at 802 n.5. Where a defendant has occupied the role of babysitter for a victim, trial courts may properly

[4] We note that Smith included a copy of the presentence investigation report on white paper in his appendix. *See* Appellant's App. p. 14-19. We remind Smith that Indiana Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Administrative Rule 9(G)(1)(b)(viii) states that "all pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in his appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part: "Every document filed in a case shall separately identify documents that are excluded from public access pursuant to Admin. R. 9(G)(1) as follows: (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked 'Not for Public Access' or 'Confidential.'"

recognize a position of trust existing between the defendant and the victim. *Trusley v. State*, 829 N.E.2d 923, 927 (Ind. 2005); *Martin v. State*, 535 N.E.2d 493, 498 (Ind. 1989), *reh'g denied*; *Watson v. State*, 784 N.E.2d 515, 523 (Ind. Ct. App. 2003).

Here, Smith had a close relationship with his victim's family due to his brother's relationship with A.R.'s mother. While A.R.'s family resided on High Street in Logansport, Smith served as a babysitter for A.R. and her two younger siblings. He even moved in with the family for a period of time. Appellant's App. p. 21A. Smith performed oral sex upon A.R. on several occasions during the time that she lived on High Street. After A.R.'s family later moved to her grandmother's residence on Perrysburg Road, Smith continued to molest her. He contends that he no longer served as her babysitter while she lived with her grandmother, based upon A.R.'s testimony that he did not babysit her at that house. *See id.* at 27. However, a closer reading of A.R.'s testimony reveals that Smith continued in his role of trusted caretaker while she and her siblings lived with their grandmother:

> Q Why was Donny in your house, in your grandmother's house?
>
> A He always came over there. My mom was working third shift and he was . . .
>
> Q B[ut] grandma was home?
>
> A Yeah, he knew my grandmother.
>
> Q Why did you need a babysitter?
>
> A He wasn't babysitting us. My grandma was there. Because, you know, she was in bed, us kids, you know . . .
>
> Q Did your grandmother have reason to know? Did you have reason to know that your grandmother knew that Donny was with you?

A I know for a fact my grandma didn't know. She was in bed; she always went to bed like eight o'clock.

Q Did he come over while she was still up or after she went to bed?

A After she went to bed or sometimes he would be there before she even went to bed but he stayed there until us kids went to bed.

Id. It is apparent from the record that Smith was a trusted family friend whose practically unencumbered access to A.R. stemmed from this relationship. Smith's emphasis on A.R.'s perception of him as a friend is inconsequential to our analysis because sexual offenses against children often involve a perpetrator grooming his or her victim for the molestation, and such a pattern of behavior is in no way mitigating. The trial court did not abuse its discretion in recognizing Smith's position of trust with A.R. as an aggravating circumstance.

II. Inappropriateness

Article VII, § 4 of the Indiana Constitution provides the appellate courts of this state the "power to review all questions of law and to review and revise the sentence imposed" in all appeals of criminal cases. Ind. Const. art. VII, § 4. We exercise this authority under the standard set forth in Indiana Appellate Rule 7(B): "The Court may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Although we are reluctant to substitute our judgment for that of the sentencing court, *Hunter v. State*, 854 N.E.2d 342, 344 (Ind. 2006), we will do so where the considerations embodied in Appellate Rule 7(B) compel us to conclude that a defendant's sentence is inappropriate.

Concerning the nature of the offense, Smith was convicted of five Class A felonies, the presumptive sentence for which was thirty years. I.C. § 35-50-2-4 (Supp. 1996). Thirty years was therefore "the starting point the Legislature selected as an appropriate sentence for the crime committed." *Monroe*, 2008 WL 2152735 at *2. Smith repeatedly performed oral sex upon a child under the age of fourteen, and "crimes against children are particularly contemptible." *Id.* Additionally, due to his relationship with his victim's family, Smith had acted as her caretaker and confidante, and he was entrusted with practically unlimited access to her company. Smith's crimes against A.R. were despicable, but we cannot conclude that they warrant consecutive sentences totaling 150 years. *See Monroe*, 2008 WL 2152735 at *3 (concluding that where defendant was convicted of five counts of Class A felony child molesting for pattern of identical offenses against one victim with whom the defendant held a position of trust, consecutive sentences totaling an executed term of 100 years were inappropriate); *see also Walker v. State*, 747 N.E.2d 536, 538 (Ind. 2001).

Regarding the character of the offender, again, Smith abused a position of trust. However, outside of Smith's offenses against A.R., he completely lacks a criminal history. This is a factor that must be considered when fashioning an appropriate sentence for a defendant.

In light of the nature of Smith's offenses and his lack of a criminal history, we conclude that a sentence of 150 years is inappropriate pursuant to Indiana Appellate Rule 7(B). We revise Smith's sentence as follows: the sentence for each individual count remains thirty years, and the sentences for Counts I and II are to run consecutively, while

the sentences for Counts III through V will run concurrently with the sentence for Count I. Smith's revised aggregate sentence, therefore, is sixty years.

Smith's sentence is reversed. We remand this cause to the trial court with instructions to enter a sentencing order not inconsistent with this opinion.

MATHIAS, J., concurs.

MAY, J., dissents without opinion.